SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and PETER G. NASH, GENERAL COUNSEL,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT SEARS, ROEBUCK AND CO.

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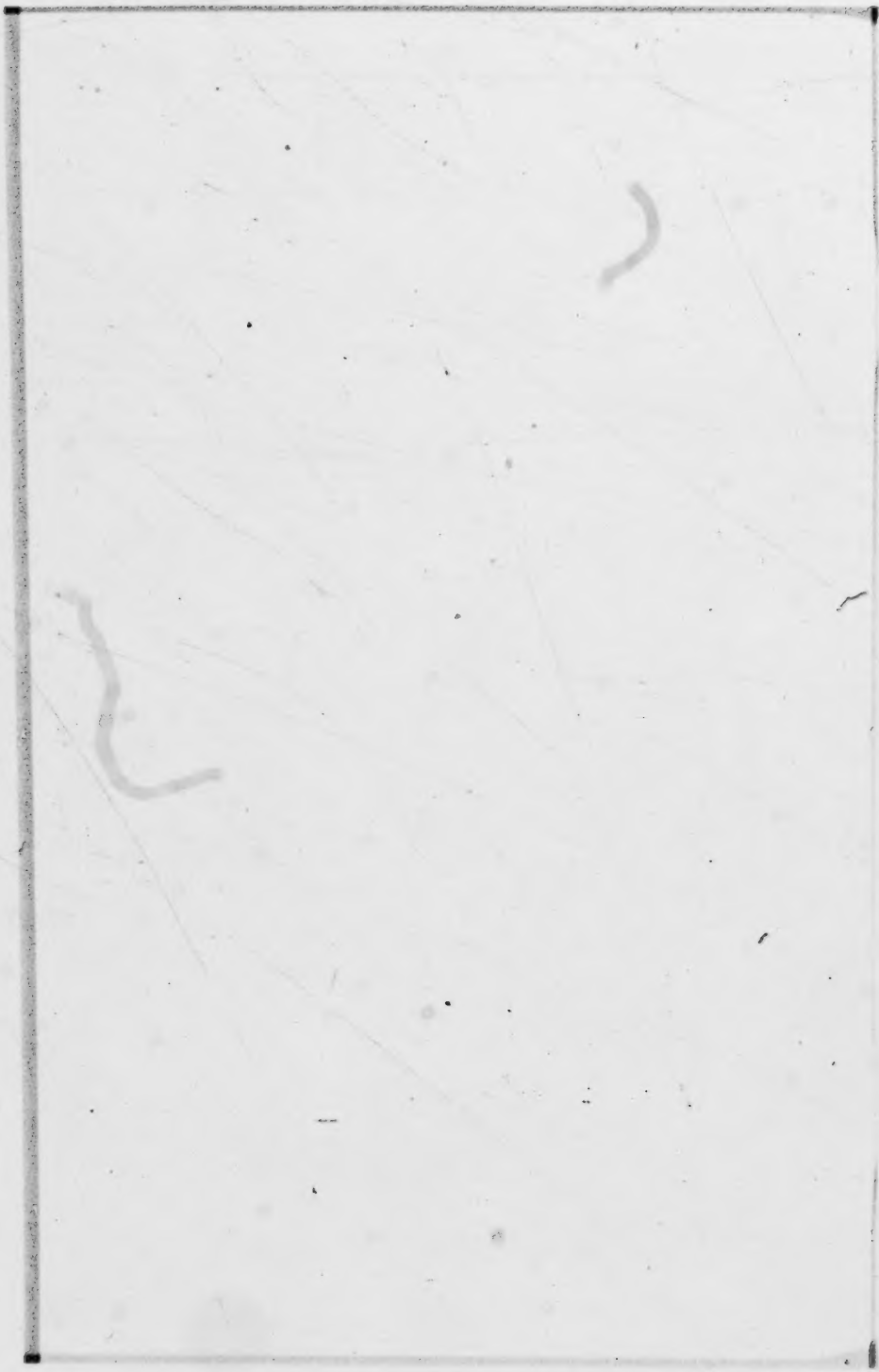

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BRIEF ON BEHALF OF RESPONDENT SEARS, ROEBUCK AND CO.

QUESTIONS PRESENTED FOR REVIEW

Petitioner General Counsel—the only government agency here involved notwithstanding the Petitioner's references to the "National Labor Relations Board" and the "Agency"—has now raised issues which have not heretofore been involved in the instant controversy. The instant case does not deal with merely the "branch of [an] agency" (Pet. br., p. 2) but with an *independent* agency—the General Counsel. The General Counsel's status as an agency is *not* at issue.[1] Accordingly, Sears is compelled to restate the primary question at issue in this case:

1. Before the District Court, the General Counsel conceded, indeed alleged (A. 39) and argued (Points and Authorities of Defendant in Opposition and in Support of Its Cross-Motion for Summary Judgment, filed with the District Court on June 21, 1972, p. 8, n. 3), that he and his office constituted an independent Freedom of Information Act agency, and the District Court so found. Pet. App. C, p. 6a, n. 4. This fact must be emphasized in light of the Petitioner's repeated use of the amorphous term "agency" which does not distinguish between the Board and the General Counsel.

> Whether, based on the evidentiary record presented to the District Court, that Court erred by finding that the General Counsel, as an independent agency under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (hereafter "the Act"), failed to sustain his burden of proof and demonstrate that certain of his records constituted exempt intra-agency memoranda rather than final opinions, or "mandatory . . . instructions to staff that affect a member of the public" (Pet. App. C, p. 7a), which must be indexed and disclosed under the Act.

In short, Sears' contention is that the memoranda at issue are the law of the agency, and that such statements of law are not intra-agency memoranda within the meaning of Exemption 5 of the Information Act (5 U.S.C. 522(b)(5)). The General Counsel has now expanded that question by contending that the memoranda at issue, even if they are the law of the agency rather than pre-decisional, consultative documents, are still exempt under Exemption 5; are part of an investigatory file protected by Exemption 7 (5 U.S.C. 522(b)(7)); and are "related solely" to internal personnel matters protected by Exemption 2. 5 U.S.C. 552(b)(2).[2] Accordingly, assuming *arguendo* the propriety of litigating new issues before this Court, the matters in dispute have now become:

> Whether memoranda (1) which embody an agency's final statement of the law; (2) which are centrally indexed by subject-matter, i.e. legal issue, and are "used" by the agency in future cases on a nationwide basis to maintain uniformity in the agency's application of law; and (3)

2. Previously, in its brief submitted to the District Court (see Points and Authorities of Defendant in Opposition and in Support of Its Cross-Motion for Summary Judgment filed June 21, 1972) and the Court of Appeals (see Appellant's principal and reply briefs), the General Counsel only argued that Exemption 7 precluded the disclosure of documents that had been incorporated by reference in the primary memoranda here at issue—not the disclosure of the memoranda themselves. In addition, with regard to Exemption 5, he argued only that the memoranda at issue were "pre-decisional" guides that did not constitute the law of the agency. Exemption 2 has never been involved in this litigation in any manner before.

which admittedly contain no actical litigation information, or other sensitive material,[3] can be classified under the Information Act as exempt intra-agency memoranda within the meaning of Exemption 5, can be considered part of an investigatory file within the meaning of Exemption 7, or can be considered "solely related" to internal personnel matters within the meaning of Exemption 2.

COUNTERSTATEMENT OF THE CASE

The General Counsel possesses the sole power under the National Labor Relations Act (29 U.S.C. § 151, *et seq.*) to consider a private party's "charge" that his rights have been violated and institute proceedings before the National Labor Relations Board; as a result, the General Counsel completely controls an aggrieved party's access to the remedial processes of the Board. 29 U.S.C. § 153(d).[4] Such direct and absolute control over private remedial rights—rather than simply public rights—is rare, if not unique, among administrative agencies.

As an independent agency vested with unreviewable authority, the General Counsel's decision as to whether to institute proceedings significantly determines the course of national labor policy. By determining, for example, to dismiss a charge, the General Counsel can preclude Board review and thereby dictate the development of the law. Recognizing this principle, Sears commenced the instant action, on behalf of itself and other similarly situated charging parties,[5] to obtain access under the

3. In its reply brief to the Court of Appeals (p. 4), the General Counsel conceded that none of the representative samples (see A. 46 and A. 51) submitted to the District Court contained such material. This procedure was in conformity with this Court's guidelines in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73.

4. Once proceedings commence, the charging party is a party to the litigation. See *International Union, etc., Local 283* v. *Scofield*, 382 U.S. 205.

5. This suit was brought as a class action under Rule 23, F.R.C.P., by Sears on behalf of itself and other charging parties under the Labor Act. The District Court, however, concluded that it

Information Act to essentially two types of documents, which, Sears alleged, were "opinions", unpublished "statements of policy and interpretations", and "instructions" that determined if, and when, a private remedy would be available under the Labor Act. The first documents, referred to as Advice memoranda, were found by the District Court to contain the substantive agency law on "new questions arising in the field of labor relations" (Pet. App. C, p. 6a) which can, absent an appeal from an adverse determination, terminate action by the General Counsel. N.L.R.B. Statements of Procedure, §§ 101.6, 101.8. The other documents, referred to as Appeals memoranda, were found to be final opinions which also could conclude, as well as determine, the final action to be taken by the General Counsel as an independent agency. The procedures of the General Counsel described hereafter provided the basis for these conclusions and findings.

A. The Advice Memoranda

An aggrieved person seeking relief from an unfair labor practice initiates agency action by filing a charge with one of thirty-six Regional Directors. N.L.R.B. Statements of Procedure, § 101.2. These Regional Directors act under the "supervision of the Office of the General Counsel" (N.L.R.B. Statement of Organization and Function, § 203.1) which has delegated to each Regional Director the authority in routine cases, after investigating the charge, to decide whether to issue an unfair labor practice complaint, thereby commencing proceedings before the Board. However, where the case involves one of several novel or complex legal issues periodically designated by the General Counsel (see, e.g., A. 151), "the regional director . . . *must* submit the case for advice from the general counsel". N.L.R.B. Statements of Procedure, § 101.8 (emphasis added). This procedure is necessary because the designated issues require a "uni-

need not address the class question "[s]ince whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons." Pet. App. C, p. 4a, n. 1.

form policy determination" for the "sound and fair administration of the [Labor] Act". Operations, p. 2A.[6] In such "Advice" cases, the Regional Director submits a statement of the facts and issues to a separate division of the Office of the General Counsel, the Advice Branch in Washington, "along with the regional director's recommendations". Pet. App. C, p. 6a. The Advice Branch does not deal with factual questions nor does it interfere with the investigation, "but rather, concerns itself with the interpretation and application of legal principles". Operations, p. 3A. The Associate General Counsel, who is delegated the responsibility for the Advice Branch, supervises the review of such "requests for advice and *formulates policy* on novel or unsettled procedural and *substantive matters* arising in unfair labor practice cases". Points and Authorities of Defendant in Opposition and In Support of Its Cross-Motion for Summary Judgment in the District Court, quoting from the N.L.R.B.'s Statement of Organization and Function, § 202.1.1 at A. 146 (emphasis added).[7] Such policy formulation by the Advice Branch assures that all important cases reach and are resolved by Washington; it is only after such "definitive policy determinations are reached in Washington" and unsettled matters clarified for the regional offices that a particular issue may no longer be required to be submitted for Advice and authority "*redelegated* to the Regional Directors." Operations, p. 2A (emphasis added).

The process by which the Advice Branch "formulates" substantive policy" is well-established and revolves around the use of

6. This quotation is from the "Operations of the Office of the General Counsel" (hereafter "Operations") described more fully *infra* at p. 10, n. 13, and appended to this brief for the Court's convenience.

7. The language of the delegation of authority to the Associate General Counsel in charge of the Advice Branch was amended on July 25, 1972—one month after Sears brought this delegation to the attention of the District Court in its Opposition to Defendant's Cross-Motion for Summary Judgment (p. 2, n. 1) filed on July 26, 1972. Since the General Counsel has failed to note any substantive change in the agency's operation either in its brief or in the courts below, it is presumed that the Associate General Counsel still possesses the authority above-described.

"agendas". This process, as described in great detail by the General Counsel to the House Subcommittee on the National Labor Relations Board in the appended statement designed as Operations, begins with a thorough study, by the staff attorney assigned to the case, of the "*recommendations* formulated by the regional director." Operations, p. 4A (emphasis added). The staff attorney then "researches all cases in point and *ascertains the applicability of prior advice determinations in similar or related cases*". Operations, p. 4A (emphasis added). This research is accomplished by utilizing an internal subject-matter index of prior Advice decisions first made public during the instant litigation. After consulting with his supervising attorney, the staff attorney makes a written and oral presentation, which notes any disagreement between the staff and supervising attorney, to an "agenda" of the ranking members of the General Counsel's staff. Oral argument by the parties is also granted in important cases. At the conclusion of this system of mutual consultation, "the Agenda decision is submitted to the General Counsel, . . . together with any dissenting opinions. . . . The General Counsel's *final determination* is [then] communicated to the Regional Office by way of an [Advice] memorandum for implementation".[8] Operations, p. 4A (emphasis added). This Advice memorandum, the document here at issue, "[i]n order to avoid any misunderstanding between the Regional Office and the Advice Branch, . . . ordinarily recites the facts upon which the Advice Branch relied in

8. The General Counsel has conceded that only "rarely, if ever," does a Regional Director disregard an Advice decision. Pet. br., p. 6. Indeed, no evidence of even a single instance in which a Regional Director did not adhere to an Advice Branch decision was presented to the District Court by the General Counsel nor discovered by Sears in its extensive examination of Advice decisions and, at oral argument in the Court of Appeals, counsel for the General Counsel conceded that he knew of no instance where a Regional Director had refused to implement an Advice decision. The record does not disclose whether Regional Directors, subsequent to an Advice decision, will refer to them to justify the Agency's decisions. Since the burden of proof rests on the General Counsel, it must be presumed that they may make such references.

making its determination, the exact issue involved, instructions for the final processing of the case, *a detailed legal rationale, including any pertinent Board or Court decisions*" (Operations, p. 4A (emphasis added)) and may also refer to prior Advice memoranda. A. 70, n. 6 (1972 Report, American Bar Association, Labor Law Section, p. 244).

An aggrieved party, whose charge the Advice Branch has concluded does not constitute an unfair labor practice, thereafter receives a summary letter from the Regional Director notifying him that the case will be dismissed if it is not voluntarily withdrawn. See, e.g., A. 12, but see A. 18 and A. 21-23. Such a refusal to issue a complaint may, in turn, be appealed to the General Counsel's Office of Appeals within ten days; however, the charging party is not permitted to see the Advice decision from which he must appeal. Absent such an appeal, further action in the case is entirely foreclosed. Of those who do choose to incur the additional expense of an appeal, only one in twenty succeed in obtaining issuance of a complaint and resultant access to the Board's processes. Operations, p. 15A.

B. The Appeals Memoranda

In contrast to the Advice Branch, which only concerns itself with the "interpretation and application of legal principles" (Operations, p. 3A) in "formulating policy" for the agency, the Office of Appeals considers an entire case—not simply a narrow legal question. Operations, p. 11A. Notwithstanding whether the case has previously been one of the few considered by Advice, if an appeal is taken, a procedure similar to that utilized in the Advice Branch is followed. Operations, pp. 11A-14A. The matter is assigned to a staff attorney who prepares a memorandum—the "agenda minute" (Pet. br., p. 7, n. 7)—containing a statement of the facts, an analysis of the issues involved and a recommendation for the disposition of the appeal. After a supervising attorney

has reviewed the "Agenda minute" and noted any disagreement, the staff attorney presents the memorandum to an agenda composed of the ranking members of the Office of Appeals. On the basis of such an analysis, the deliberation of the agenda and any oral presentation by the parties (which is occasionally permitted) the decision of the Office of Appeals is made. This decision is reduced to a memorandum entitled "General Counsel's Minute" —commonly referred to as an "Appeals memorandum" or "decision"—which is cleared, "in the usual manner", through the Special Assistant to the General Counsel. These "General Counsel's Minutes"—not the pre-decisional "agenda minutes" or any other documents—are here at issue.[9] Such decisions, contrary to the General Counsel's brief, are then centrally indexed by subject-matter.[10] The parties are advised by a summary letter (Pet. App. C, pp. 7a-8a) which, if adverse, closes the matter. Operations, p. 13A.

C. The Instant Litigation

Following repeated denials of Sears' request for access to the Appeals and Advice memoranda by the General Counsel, Sears commenced the instant action in August, 1971. In February, 1972, six months later and nearly eight months after Sears first sought access to the decisions, the General Counsel announced that Sears would be provided a portion, but not all, of the information sought under certain specified conditions.[11] Specif-

9. The District Court, while ordering the production of "Appeals memoranda" which, in fact, are the General Counsel's Minutes, inadvertently referred to them in its opinion in one place as "agenda minutes" (Pet. App. C, p. 7A)—a different document not sought by Sears. The parties, however, have both recognized this error. Pet. br., p. 7, n. 7.

10. The General Counsel represented to the lower courts that the Appeals decisions—General Counsel's Minutes—have been indexed by subject matter since August, 1971. See, e.g., Appellant's br. in the Court of Appeals, p. 29, n. 23, and p. 16, n. 11.

11. The disclosure was made subject to the following conditions:

(1) Memoranda decisions would not be supplied until all litigation respecting the case had been concluded;

ically, the General Counsel made available to Sears a secret index to Advice memoranda in closed cases; those Advice memoranda in closed cases which Sears selected from that index; and those Appeals memoranda selected by Sears. The General Counsel refused to produce, however, the Advice or Appeals memoranda in any pending cases, including that involving the decision on the charge filed by Sears (Board Case No. 19-CB-1673) which originally triggered this litigation. In addition, after Sears discovered that the memoranda often relied substantially upon outside materials, e.g., the language of a provision of the collective bargaining agreement being construed, or simply referred to the "circumstances of the case," the General Counsel refused Sears' requested access to any additional documents.[12] Finally, the General Counsel repeatedly stated that disclosure was only for purposes of this case and not because of any obligation to produce any memoranda, indices or supporting documents under the Information Act.

Before the District Court the General Counsel adduced no evidence or affidavits. Basically the entire record below, upon which the General Counsel must sustain his burden of proof under the Act, consists of several samples of the disputed Advice and Appeals memoranda which were agreed to be representative samples (see *Environmental Protection Agency* v. *Mink*,

(2) Memoranda respecting cases where litigation had been concluded or involving final administrative dismissals would be supplied in a "sanitized" form only, identifying references to earlier Advice or Appeals memoranda, although cited for precedential value, would be deleted; and

(3) No underlying factual data and/or documentation would be supplied even where such data is relied upon in the memoranda but is insufficiently described therein. A. 42-44.

12. Sears clearly identified for the General Counsel each of the decisions and other materials which it desired. With regard to those cases sought by Sears which relied upon the "circumstances of the case," Sears suggested the production of the parties' briefs, the Regional Director's statement of the facts, or any other information which the General Counsel would be willing to make available to fill the void in the decisions without requiring the production of the General Counsel's entire file. A. 89-91, 137-139.

410 U. S. 73 (1973)), a statement of material facts, and the concession that Operations (see n. 6, *supra*) is a substantially accurate description of the General Counsel's operations.[13]

The General Counsel argued in the lower courts only that the disputed memoranda represented recorded policy deliberations, prior to the formulation of any decision, and, therefore, were intra-agency memoranda within the meaning of Exemption 5. Paradoxically, although the General Counsel repeatedly contended in both courts below that the disputed Advice and Appeals memoranda could contain "settlement suggestions," "discussion of possible defenses and prosecution approaches," "apprise Regional Director of possible future problems on internal procedural matters," and "reflect difficulties perceived by staff members in reach[ing] the final decision" (see General Counsel's Points and Authorities filed on June 21, 1974 in the District Court, pp. 4, 18; and the General Counsel's principal brief in the Court of Appeals, pp. 18, 20), it was finally admitted in the General Counsel's Reply Brief before the court below (pp. 4-5) that the representative examples presented to the District Court contained no such material. Sears argued in response that the disputed memoranda contained substantive agency law on all "the new questions arising in the field of labor relations" (Pet. App. C, p. 6a) and thus constituted the instructions and final opinions of the agency, *i.e.*, the General Counsel. Sears also disputed the General Counsel's only other contention, that documents incorporated by reference into the disputed memoranda were exempt under Exemption 7 notwithstanding their incorporation.

The District Court concluded that, after consideration of the undisputed facts and review of the representative samples, that

13. Before the Court of Appeals, in answer to a direct question from Judge Robb, counsel for the General Counsel reaffirmed that the procedure set forth in Operations "is basically correct". The General Counsel, has in its present brief to this Court, also relied on Operations as a correct statement of the General Counsel's procedures. Pet. br., p. 5.

the Advice and Appeals memoranda were "instructions" affecting the public and "final opinions" which were required to be disclosed under the Act. The District Court also required, subject to deletion of the names of affiants, settlement suggestions and other independently exempt matters, that where the memoranda expressly incorporated by reference other documents or explanatory material, such information was to be considered part of the memoranda. Pet. App. C, pp. 8a-10a. This decision was affirmed, without opinion, by Judges Miller, Wright and Robb of the Court of Appeals in a *per curiam* decision on the basis of the District Court's decision and *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F. 2d 710 (D. C. Cir. 1973).

SUMMARY OF ARGUMENT

1. The courts below properly found that Advice and Appeals decisions are not "intra-agency memoranda" within the meaning of Exemption 5, but, instead, are the substantive, binding law of the agency. Accordingly, without regard to whether they are categorized as (1) "final opinions," (2) "statements of policy or interpretations adopted by the agency" or (3) "administrative instructions" which affect the public, the test of Exemption 5, *i.e.*, whether documents are discoverable, is irrelevant because the entire exemption is inapplicable. The test of Exemption 5, as this Court recognized in *Environmental Protection Agency* v. *Mink*, is utilized to distinguish between disclosable factual data contained in intra-agency memoranda: the records of the pre-decisional deliberations to which Exemption 5 was strictly delimited.[14] Here the issue is wholly different. What is sought in this case is the law of the General Counsel as an independent agency—the *result* of its decisional process rather

14. In *Mink*, the opening premise of this Court's discussion was that the documents at issue there were, in fact, "intra-agency memoranda" within the meaning of the Information Act. 410 U.S. at 85. It is this initial premise which is in dispute in the instant case.

than any pre-decisional discussions. The very fact that the brunt of the documents at issue are now being disclosed, as a matter of grace, surely belies any claim that the agency's decisional process is being improperly placed in a "goldfish bowl", and strongly militates in favor of recognizing that such documents are the actual substantive law and policy that is applied to the public on a day to day basis or, in other words, the law of the agency that determines a private individual's access to the remedial processes under the national labor scheme.

2. The lower courts were not asked by the General Counsel to consider whether Advice and Appeals decisions are part of investigatory files within the meaning of Exemption 7 of the Information Act. In any event, Sears submits that they are not. These decisions, after all, are centrally filed and indexed by subject-matter in Washington apart from any individual investigatory files.[15] This central system is admittedly used as a "research tool" (A. 149) in the decision of future cases in order to develop a uniform labor law.[16] Accordingly, these memoranda are *not* restricted to the investigatory files, but are used and relied on, as well as cited (A. 70, n. 6), as authority within the agency. To permit an agency to hide such decisional law behind the protection intended only for its investigatory materials would improperly distort the purposes of Exemption 7.

3. The General Counsel's claim that Exemption 2 applies to Advice and Appeals decisions is equally belated and similarly without merit. Although the courts below were not afforded an opportunity to address this issue, the General Counsel's construction of Exemption 2 has been uniformly rejected

15. Although, as the General Counsel claims, the indexing of Appeals decisions by subject matter did not commence until August, 1971, even before that date separate chronological files of all Appeals decisions were kept in Washington.

16. Since there is no dispute as to the use of the Advice index, the Appeals index must also be assumed to be similarly used absent a showing to the contrary.

by three courts of appeals[17] and the leading commentator in the area.[18] Exemption 2 was intended to protect precisely what is stated in the Exemption and nothing more; records "related *solely* to internal personnel rules and practices" (emphasis added). The purpose clearly was to exclude any member of the public from intruding into a limited area of no public concern, i.e., documents "related solely" to internal personnel matters. The final and binding law of an agency manifestly is not encompassed by this limited purpose.

4. Finally, the courts below, after recognizing that the documents here at issue were the law of the agency which must be disclosed, were correct in requiring that materials incorporated by reference therein must also be revealed. Otherwise, such a technique could obscure the real agency decision and effectively evade the disclosure mandated by Congress.

ARGUMENT

I.

Advice and Appeals Memoranda Are Required to Be Made Available to the Public Under the Act

The General Counsel admittedly possesses a rare power—the unreviewable discretion to determine which cases, and, therefore, what questions of law, will be presented to the Board. To maintain a uniform national labor policy in accord with the Congressional intent, extensive centralized control over the issuance of complaints is naturally necessary. The principles under which this prerogative is exercised are embodied in the Advice and Appeals memoranda sought here: these are the

17. See *Stokes* v. *Brennan*, 476 F. 2d 699 (5th Cir. 1973); *Hawkes* v. *I. R. S.*, 467 F. 2d 787 (6th Cir. 1972); and *Rose* v. *Dept. of the Air Force*, 495 F. 2d 261 (2nd Cir. 1974). To the same effect: *Vaughn* v. *Rosen*, C.A. No. 1753-72 (D.D.C. October 9, 1974), on remand from 484 F. 2d 820 (D.C. Cir. 1973).

18. Davis, Administrative Law Treatise (1970 Supp.), § 3A.17.

only expressions of the complete rationale underlying the decisions of the agency to prosecute or to dismiss a charge.[19] In fact, in the General Counsel's public Quarterly Reports (e.g., A. 150), the General Counsel specifically discloses certain Advice and Appeals decisions to "which [he] directed his personal attention . . . [for the stated purpose of keeping] the public advised of how, when and why I am acting." A. 150. The District Court's decision below assured that, instead of being selectively informed, the public will now be fully informed. Such disclosure enables an individual to conform his action to the agency's understanding of the law applied by that agency and, accordingly, fulfills one of the primary objectives of the Act—to "elucidate" government "actions to the American public". *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696, 699 (D.C. Cir. 1969).

The importance of this substantial body of administrative precedent, heretofore withheld from the public, cannot be minimized. The large majority of unfair labor practice charges are never permitted to reach the Board.[20] It is for this reason that the American Bar Association has consistently urged the General Counsel to disclose Advice and Appeals decisions in order to effectuate the legislative mandate of the Act. Only then can the labor bar effectively advise its clients as to the current state of agency law. Only then can the public, and indeed Congress, be assured that the General Counsel's absolute control of the right to a private remedy is being fairly and equitably applied.

19. Compare, e.g., the letters sent to the parties (A. 199) with the Appeals memoranda in similar cases (A. 205-209, 210-212); and the original letter sent to Sears dismissing its case (A. 12), the more detailed rationale thereafter supplied by the Regional Director at the direction of the General Counsel (A. 18, 21-23), and examples of Advice memoranda in comparable situations. A. 86-87, 194-198. See p. 19, n. 24, *supra*.

20. In fiscal 1972, for example, only 33 per cent of all unfair labor practice charges were found to have merit by the General Counsel and only *six per cent* reached the Board for decision. 37th Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1972.

Thus, as early as 1970, the Labor Law Section of the American Bar Association, consisting of leading members of the labor bar representing both unions and management, concluded:

> [T]hese "precedents" [Advice and Appeals memoranda] constitute precisely the kinds of "final opinions, statements of policy and interpretations" and "instructions to staff that affect a member of the public," which the Freedom of Information Act contemplates should be indexed and made available to the public.

Vol. II 1970 Report, Labor Relations Law Section, American Bar Association, p. 7 (A. 57). The Section has maintained its position to the present and has, with regard to the instant case, urged the General Counsel to comply fully with the decisions of the lower courts. Vol. II, 1971 Report, pp. 233-237, 242-246; Vol. II, 1972 Report, pp. 217-220 (A. 54-73); and see also Vol. II, 1973 Report, p. 244, and 1974 Committee Reports, pp. 249-250. The lower courts' orders comport with this view, and do not delve into the agency's decisional processes—the agenda system of confrontation and discussion—but only direct the production of ". . . the end product . . ." (H. Rep. No. 1497, 89th Cong. 2nd Sess., p. 7 (1966)) of that agenda process—the General Counsel's resultant final law.

In contrast to the substantive content and effect of Advice and Appeals decisions, the record is totally barren of any proof whatsoever that such memoranda refer to trial tactics, settlement directions or discussions of evidence. The General Counsel's reliance upon such claims (Pet. br., p. 21) is totally unfounded. Indeed, at no time did the General Counsel introduce *any* evidence as to privileged information of any kind contained in the memoranda, and subsequently conceded below the absence of such material. Reply brief of the General Counsel in the Court of Appeals, p. 4. In light of this concession as to the absence of such proofs before the District Court, the imaginative *post hoc* rationales of counsel as to what such documents could contain must be wholly disregarded. Cf., e.g., *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 443-444 (1965).

A. Advice Memoranda Constitute Final Opinions, and/or Mandatory Instructions of the General Counsel

The determination made by the Advice Branch is a crucial step in obtaining access to the Board and its remedial powers. Many charging parties undoubtedly fail, as do many litigants in the courts, to appeal. In fact, with only a five per cent chance of obtaining a reversal from the Office of Appeals, the Advice stage is not only critical, but determinative. The General Counsel nevertheless argues that, in effect, that Advice memoranda are merely internal working papers in which opinions are expressed (see *Sterling Drug, Inc.* v. *F.T.C.*, 450 F.2d 698, 704 (D. C. Cir. 1971)) rather than, as the District Court found, final opinions and/or mandatory instructions.[21]

Contrary to the General Counsel's contention, however, the Regional Director's role in implementing Advice memoranda is simply ministerial. Regional Directors are required to sub-

21. The General Counsel has contended that these "instructions" are not "administrative" and, therefore, not within the scope of subsection (a)(2)(c). That subsection requires the disclosure of "administrative staff manuals and instructions to staff that affect a member of the public". Although it is not apparent that "administrative" modifies "instructions", even if such an assumption is made, the "administrative" limitation was only added "to bar disclosure of information which, if known to the public, would significantly impede the [law] enforcement process". *Stokes* v. *Brennan*, 476 F. 2d at 699. This test, it is submitted, is correct and sound, and not an extreme view as contended by the General Counsel (br., p. 43). See Davis Admin. Law Treatise. (1970 supp.), § 3A.12. In light of the concession by the General Counsel that the memoranda are devoid of tactical litigation material (Court of Appeals Reply br., p. 4), Sears submits that disclosure of agency law will not "significantly impede" law enforcement but will, instead, have the salutory effect of permitting the public through a well informed labor bar "to conform [its] actions to an agency's understanding of the law". *Hawkes* v. *I.R.S.* 467 F. 2d at 795. Indeed, in drafting the administrative restriction, the Senate Report expressly recognized the Information Act's application to a prosecutorial agency, and drew a distinction between "traditional confidential instructions" and the "basis for administrative action". The latter, which is involved here, was intended to be open to "public examintion". Sen. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 2.

mit to Advice all cases involving novel or significant issues. See, e.g., the General Counsel's Quarterly Report at A. 150. The subsequent Advice determination is then uniformly followed by the Regional Directors with, as the General Counsel admits, an exception, if at all, only "in [a] rare case". Pet. br., p. 6. In fact, this asserted "rare" exception is, on the record, nothing more than conjecture. Nowhere in the record is there a ***single*** instance in which an Advice determination was not followed. In fact, it is necessary, by the General Counsel's own admission to Congress, that Advice cases, on the cutting edge of the law, be handled by the Office of the General Counsel in order to avoid "chaotic development in the law". Operations, p. 7A. Such chaos is avoided through the use of a centralized subject-matter index. The suggestion that Regional Directors can resolve such significant cases inconsistently, and contrary to the General Counsel's own views, is clearly specious. Even the very language of Advice memoranda clashes dramatically with the General Counsel's description of the Advice Branch's relationship with the Regional Directors and further substantiates the Regional Directors' lack of authority in Advice cases. As the memoranda indicate, Regional Directors only issue a complaint after receiving an "authorization" from the Advice Branch. See, e.g., A. 86-87, 88. While Advice considers the Regional Directors "recommendations" (see, e.g., A. 88, 188-189, 190), the Branch draws its own binding "conclusions". See, e.g., A. 194-198. Such final and binding conclusions of an agency, as the District Court found, must be deemed public information.

There is no basis to differentiate between Advice memoranda in open cases and those in closed cases. In each instance, there has been a binding decision of the agency. Open cases, as well as closed cases, are discussed by the General Counsel in his Quarterly Reports. The refusal to provide Advice memoranda in open cases is particularly egregious where, as was the case here, the party seeking the information is an unsuccessful charging party before the agency. In such a case, the General Counsel's

present policy of denying a charging party the full "legal rationale" (Operations, p. 4A.) for the dismissal of his charge is unfair as well as impermissible under the Act which was intended "to enable] the public . . . . to deal effectively and upon equal footing with" the Agency.[22] Instead of being properly apprised of the argument he must confront upon appeal, the Regional Director only sends the charging party "a simple statement" (NLRB Rules and Regulations, Sec. 102.19),[23] which the American Bar Association found "as a rule, does *not* apprise the parties of the issues and rationale which led to the dismissal of the charge". Vol. II, 1972 Report, p. 219 (emphasis added). The General Counsel has also conceded, during this litigation, that a dismissal letter is different from the Advice opinion. A. 29-31.[24] This gap between the Advice memoranda, representing the agency's actual decision, and the Regional Director's perfunctory dismissal letter constitutes the very type of secret law that the Act was meant to preclude.

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22. S. Rep. 1219, 88th Cong., 2d Sess., p. 3; see also S. Rep. No. 813, 89th Cong. 1st Sess., p. 7, where it was stated that one purpose of the Act was to ". . . prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion. . . ."

23. By contrast, the same Regulations require the charging party, if he wishes to appeal, to file "a complete statement setting forth the facts and reasons upon which it is based". N.L.R.B. Rules and Regulations, Sec. 102.19.

24. For instance, in the underlying Board case here, Sears was only given the particular reasons for the adverse Advice decision after the General Counsel himself explicitly directed the Regional Director to reveal that rationale. A. 18, 21-23. Only then was Sears ostensibly apprised of the legal conclusions its appeal had to meet and, therefore, was able to formulate a "meaningful" argument in its appeal. Cf. *American Line, Ltd. et al.* v. *Gulick*, 411 F. 2d at 704. Yet, even now, there is no way of knowing whether the full rationale was ever revealed and there is no indication that a similar explication has ever been given to any other party.

B. Appeals Memoranda Constitute Final Opinions Of The General Counsel

As in the Advice Branch, the Office of Appeals employs an "agenda" from which a decision issues for the approval of either the General Counsel or his Special Assistant Operations, p. 13A. If approved, the Appeals memoranda sought here—the General Counsel's Minute—is issued to the Regional Director, but not the parties, in cases where the Office of Appeals reverses and orders the issuance of a complaint.[25] As with Advice memoranda, however, such Appeals memoranda constitute a "final opinion" which concludes all proceedings before the Office of the General Counsel. The fact that, under a new policy, an additional expanded letter, which the General Counsel already concedes to be within the scope of the Act, is now sent to the parties does not detract from the inherent public nature of the Appeals memoranda. A comparison of the two documents reveals the new letters to be incomplete. Compare, e.g., A. 199 with A. 205-212. The Appeals memoranda, as the only complete agency decisions, are required to be made public.

C. The General Counsel Can Issue Final Opinions Within the Meaning of the Act

Notwithstanding the General Counsel's concession that he constitutes an "agency", the General Counsel now asserts that he is incapable of issuing a final opinion, Pet. br., p. 45. Specifically, he takes the position that he does not adjudicate and therefore, cannot issue a "final opinion . . . made in the adjudication of cases". 5 U.S.C. 552(a)(2)(A). This assertion wholly disregards the express terms of the statute. As an independent agency, the General Counsel's decision whether to prosecute is clearly an "order" which is statutorily defined as "the whole

25. Prior to April, 1971, a General Counsel's Minute was written and filed in *all* Appeals cases. Pet. br., p. 7, n. 6. Such memoranda are now written only after the Office of Appeals decides to direct the issuance of a complaint.

or any part of the final disposition . . . af *any agency* [i.e., the General Counsel] *in any matter* other than rule making but including licensing". Section 2(d) of Administrative Procedure Act 60 Stat. 237 (1946) (codified at 5 U.S.C. 551(6)) (emphasis added). An adjudication, in turn, is defined in the same section as any "agency process for the formulation of an order". In short, the decision to prosecute or withhold prosecution is an "order" and the "process" in formulating that order fulfills the requirements of an "adjudication". Since Advice and Appeals decisions can constitute in any given situation the Agency's final action, as already shown, they constitute "final opinions made in the adjudication of cases" and must, therefore, be disclosed. See also Davis Admin. Law Treatise (Supp. 1970), § 3A.8.

D. Both Advice and Appeals Memoranda Are Also Unpublished "Interpretations of the Agency" Subject to Disclosure

Wholly apart from whether Advice and Appeals decisions are "final opinions" and/or "administrative instructions" affecting the public, Sears submits, as it originally alleged, that they are unpublished "statements of policy and interpretations . . . adopted by the Agency". 5 U.S.C. 552(a)(2)(B). At the threshold, there is no doubt that the disputed documents are "interpretations", i.e., the application of the law to a set of facts. The question then is whether these interpretations have been "adopted by the Agency", the General Counsel. There is no ambiguity in this language; "the ordinary meaning of those words reaches any interpretation, as here, issued by the Agency or its delegates acting within their scope of authority". *Tax Analysts and Advocates* v. *I.R.S.*, 362 F. Supp. 1298, 1303 (D.D.C. 1973), *aff'd.* ____ F. 2d ____ (D.C. Cir. August 19, 1974).[26] See also

26. Upon appeal in *Tax Analysts*, the Justice Department, representing the Internal Revenue Service, conceded that documents highly similar to those here at issue were interpretations adopted by that agency. There, as here, the documents were centrally indexed and used as a research tool, at least in part, and represented the

Hanover Bank v. *Commissioner*, 369 U.S. 672, 686 (1962); Davis Admin. Law Treatise (1970 Supp.), § 3A.9. Contrary to the General Counsel's position (Pet. br., p. 42, n. 30), the fact that an interpretation has been "adopted" and applied does not require that it be a binding precedent, nor, therefore, is it necessary that an "interpretation" be binding precedent to be subject to the Act. Notwithstanding any binding effect, an interpretation applied by the General Counsel represents the agency's current view of the law. The failure to disclose that current view can accomplish but one purpose: the concealment of arbitrary or unjustifiably inconsistent decisions notwithstanding that such disclosure is one of the Act's objectives.[27]

Disclosure is especially necessary in the instant case where many of these disputed documents are, in fact, effective precedents: they are centrally indexed by legal issue; prior Advice memoranda are cited as authority in Advice cases (A. 70, n. 6); the agency attempts to maintain uniformity in its application of the law; the indices are used for that purpose; the Regions obey the decisions issued from Washington; and, as future cases arise in any region, the previous decisions issued from Washington are presumably binding in order to achieve the object of attaining uniformity in the issuance of complaints.

E. The Act's Exemptions Are Inapplicable

Even though the policy of the Act requires that the disclosure requirement be construed broadly and the exemptions narrowly, the General Counsel contends that the requested documents are

agency's view of a single situation. Those documents were the agency's decision not to claim that members of the public violated the Internal Revenue Code, i.e., a decision not to prosecute.

27. The structure of the Act amply supports this construction. Section 552(a)(1)(D) requires the publication in the Federal Register of all statements of *general* policy or *interpretations of general applicability* formulated and adopted by the agency. In contrast, Section 552(a)(2)(B) requires the public availability of unpublished "interpretations . . . adopted by the Agency". Interpretations which are *not* of general applicability must be made available, but not published.

"intra-agency" memoranda, part of an investigatory file, or "related solely to the internal personnel rules and practice of an Agency", and, therefore, exempt from disclosure under 5 U.S.C. 552(b). These contentions, it is submitted, are erroneous.

1. *Exemption 5*

In *Mink*, this Court stated that Exemption 5 was to be "narrowly delimited" with the objective only of preventing injury "to the consultative functions of government". 410 U.S. at 87. Accordingly, it follows that the Act "calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy . . . , [while the exemption applies only to] papers which reflect the agency's group thinking process of working out its policy and determining what its law shall be," Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967). As a result, while the "intra-agency" Exemption may apply to materials prepared for use within an Appeals or Advice *agenda*, the sought-after memoranda, which constitute, as demonstrated above, "the end product" of the decisional process applied to the public are not covered. The fact that documents may pass between agency personnel for implementation does not alter their nature, nor should it bring them within the narrow scope of the exemptions. Congress intended to protect only the free flow of information and ideas and did not "design [the exemption] to facilitate the easy exchange of *substantive declarations of policy*. Indeed, if it were, the exemption would have clearly engulfed the rule." *Sterling* v. *F.T.C.*, 450 F. 2d at 713; Bazelon, J., dissenting in part (emphasis added). Such a construction, needless to say, would be far too expansive since it would improperly permit any agency to throw a protective blanket over all information by simply creating a ministerial bureaucracy to implement the agency's substantive decisions.[28]

28. The discovery standards in Exemption 5 of the Act, upon which the General Counsel substantially relies, are not applicable here. The requested documents, as shown above, are not intra-

2. *Exemption 7*

Notwithstanding that Advice and Appeals memoranda are, as already demonstrated, the law of the agency, the General Counsel contends that such law can be withheld under the guise of its investigatory files. Such a position strikes at core of the Information Act by allowing a system of secret law that the Act was meant to preclude. At issue here are not investigatory files but, instead, a system of law contained in subject-matter files and indices retained in Washington and used for a non-investigatory purpose—the resolution of related future cases.[29] The disclosure of this system of law was not the objective when Exemption 7 was enacted.

Exemption 7 was directed at protecting material such as "the statements of witnesses." 119 Cong. Rec. 17667. Indeed, since Senator Humphrey was acting at the urging of the American Bar Association in formulating Exemption 7 (Pet. br., p. 30), it is revealing that the Labor Law Section of the American Bar Association has consistently sought the disclosure of the docu-

agency memoranda within the meaning of the Act. Even assuming *arguendo*, however, that the material here constitutes "intra-agency" memoranda, the exemption only limits the production of material that would not be available in discovery during litigation with the agency—rather than a private party. Therefore, the work product rule applied to private attorneys is wholly inapplicable in the circumstances of this case. As Professor Davis observed:

> I think the work product of a private attorney is something altogether different from a basic memorandum by the legal staff of an agency which is used by the agency as a guide in the handling of cases involving private parties. To the extent that such a memorandum states the effective law of the agency, its adoption by the agency makes it something more than the work product of the legal staff. . . .

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967).

29. The General Counsel has expressly conceded that Advice indices and files are referred to and used to assure that future cases are decided uniformly. Absent a showing to the contrary by the agency, it must be assumed that the New Appeals index is similarly used.

ments at issue (pp. 15, 18-19, *supra*)—a clear recognition of the distinction between the memoranda here at issue and the investigatory materials and affidavits contained in the regional files. The General Counsel's efforts to describe the memoranda "as a selective summary of investigative results" (br., p. 32) is clearly hyperbole. It is belied by both the General Counsel's failure to make such a claim before the lower court and the representative samples of such documents contained in the record and available for this Court's examination. With regard to any overlap in individual situations between regional investigatory data and the Washington subject-matter files and indices involving confidential data, the agency has the option under the District Court's order to make the appropriate deletions. The heart of these disputed documents, however, is the interpretation and application of legal principles. The placement of an additional copy of the documents in case files in regional offices cannot be permitted to foreclose public access to the agency's working body of law maintained in its Washington files for use in future cases.

3. *Exemption 2*

The language of Exemption 2 is seemingly clear in only exempting from disclosure matters:

> . . . related solely to the internal personnel rules and practices of an Agency.

The purpose of the Exemption is thus narrowly limited to matters, unlike those here, involving the relationship of the federal government as an employer and of no impact on the public, i.e., "related solely" to internal personnel matters. The General Counsel, after having apparently acceded to this obvious meaning, now seeks to distort this Exemption by relying on an argument rejected by three courts of appeals[30] and

30. *Stokes* v. *Brennan*, 476 F. 2d 699 (5th Cir. 1973); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787 (6th Cir.

Professor Davis.[31] In effect, his argument is that the words of the exemption conflict with *half* the legislative history, the House Committee report, and the latter must be accepted. There is, however, "no need to refer to the legislative history where the statutory language is clear". *Ex Parte Collett* 337 U.S. 55, 61 (1949). As this Court has stated:

> The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.

Gemsco v. *Walling*, 324 U.S. 244, 260 (1945). This proposition is especially applicable in the instant case where the legislative history relied on by the General Counsel has been severely criticized as being "not the law" and "contrary to the needs of fairness, contrary to the report of the Senate Committee, and *contrary to the clear words of the statute*". Davis, Admin. Law Treatise (1970 Supp.) §§ 3A.9, 3A.31 (emphasis added).

The Senate Committee report, moreover, in contrast to the House Committee report, is true to the language of Exemption 2 by indicating that: "Examples of [exempt matters] may be rules as to personnels use of parking facilities or regulation of lunch hours, statements of policy as to sick leave *and the like*." No. 813, 89th Cong. 1st Sess. (1965), p. 8 (emphasis added). This narrow scope of the exemption, Sears submits, is proper. The General Counsel's reliance on highly different language contained in the House Committee report which, in the words of Professor Davis, ". . . once again tries to change the meaning of the legislative language . . ." (Admin. Law Treatise (1970 Supp.), § 3A.17), is misplaced.

1972); *Rose* v. *Dept. of Air Force*, 495 F. 2d 261 (2nd Cir. 1974).

31. Davis, Admin. Law Treatise (1970 Supp.), § 3A.17.

This language in the House report, which is, in turn, relied on by the Attorney General's Memorandum[32]—the General Counsel's other primary authority—was not written until after the Act had "passed the Senate on the basis of a committee report which was faithful to the words of the bill". Davis, § 3A.31. Thereafter, the House Committee yielded to heavy pressure from the agencies, but failed to amend the bill and instead drafted restrictions in its Report which "contradict the words of the bill and . . . the Senate committee report". *Id.* The reliance on these contradictions by the General Counsel and the Attorney General constitutes an abuse of legislative history that cannot be permitted. Exemption 2 applies only to items of no impact upon the public, that is, matters "related solely" to internal personnel affairs. The memoranda here at issue do not fit that definition, and must, therefore, be disclosed.

II.

The District Court Properly Required the Production of the Complete Advice and Appeals Memoranda

In the course of examining the Advice and Appeals memoranda to which Sears was afforded access, Sears' attorneys observed, and the District Court agreed (Pet. App. C, p. 8a-9a), that a substantial portion of the decisions inspected were incomplete in that they incorporated by reference and relied upon provisions of various extraneous documents—e.g., collective bargaining agreements or contract interpretations—without describing or attaching such documents to the memoranda. A. 75-79, A. 88, but see A. 81-82. Moreover, the majority of the Appeals memoranda, rather than stating the significant facts upon which the decision hinged, relied upon the "circumstances

32. Congress placed the primary responsibility of administering the Information Act in the federal courts to protect the public from the agencies. The Attorney General's Memorandum constitutes, therefore, nothing more than an adversarial viewpoint seeking to restrict the scope of the congressional mandate.

of the case". Such techniques in drafting public decisions embodying the agency's law circumvent, as the lower courts recognized, the policies of the Act.[33]

A. Those Documents Incorporated by Reference Must Be Disclosed

First, with regard to the specific documents expressly incorporated into memoranda, it follows that, if the Advice and Appeals decisions must be made public, that information which is incorporated into such documents must likewise be disclosed. The fundamental difference between the General Counsel's position and that of Sears is basically the General Counsel's continuing failure to recognize that the memoranda are, as already demonstrated, the law of the agency which must be disclosed. Whether the agency intended to or wants to disclose its law is irrelevant. The meaning of that law cannot be hidden by short hand techniques which obfuscate for the public the meaning of its decisions. If an agency refers to or relies upon a document as part of what the General Counsel calls an "efficient" method of drafting an agency decision, it cannot refuse to disclose that document. Regardless of what exempt status the document might otherwise have, through incorporation it has become a part of the decision itself. For instance, a decision which revolves about the construction of a contract clause is absolutely meaningless if the language of the pertinent contract provision is not disclosed. It does not matter that the contract might otherwise be exempt

33. As the Labor Law Section of the American Bar Association stated in its 1973 Report, Vol. II, p. 244:

> Your Committee continues to adhere to the view that where documents are expressly incorporated by reference in [Advice and Appeals] memoranda, they should be produced; that where memoranda rely upon "circumstances of the case" or some other vague or imprecise reference without delineating such circumstances, explanatory material should also be made available unless exempt under the Act; that the General Counsel should not delete material without fully explaining or justifying the basis for such deletion; and that unless there are clear extenuating circumstances, documents requested should be produced with reasonable promptness.

from disclosure. The General Counsel has chosen a particular method of writing its decisions and cannot now use that method as an excuse to prevent disclosure.

Second, the device of relying on the "circumstances of the case" in a decision, without delineating those circumstances, also emasculates the decision and, accordingly, renders the public's right to disclosure meaningless. In such a form the public is being deprived of a substantive body of agency law that the Act was meant to disclose. See, e.g., A. 75-79; cf. A. 81-82. Parties cannot be required "to operate in a darkroom". *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d at 703. Such decisions, it cannot be forgotten, are, as the American Bar Association Labor Section has recognized (pp. 18-19, *supra*), the *only* document containing the legal rationale of the agency's decision. The use of a shorthand phrase to refer agency personnel to other documents cannot be used to circumvent access to these critical formulations of policy.

B. The District Court's Order Is a Proper Method of Curbing Circumvention of the Act's Disclosure Requirements

The District Court's order was carefully molded to best achieve the objectives of the Act. The Court did not order, nor did Sears ever suggest, that the General Counsel produce its "entire investigatory files" as the General Counsel would have this Court believe. Nor did it order the production of witnesses' affidavits as the General Counsel implies. In fact, the Court carefully permitted the General Counsel to delete the names of affiants from its public decisions and, with regard to providing explanatory material to fill the void created by the General Counsel's references to the "circumstances of the case", the Court expressly permitted the General Counsel to withhold documents "exempt under the Act". In sum, the Court did not order, nor does Sears want, the General Counsel's investigatory files. Indeed, the Court granted the General Counsel the discretion of selecting the appropriate method of filling the gaps in his deci-

sions rather than ordering the production of specific documents as Sears had requested. A. 89-91; A. 137-139. The General Counsel may now disclose the Regional Director's statement of the facts, the parties' briefs (which are currently disclosed to the parties by the Office of Appeals), or any other document the General Counsel chooses, as long as the pertinent, but missing, facts are supplied.

CONCLUSION

For each of the foregoing reasons, it is respectfully requested that the judgment of the District Court and Court of Appeals be affirmed.

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APPENDIX

OPERATIONS OF THE OFFICE OF NLRB GENERAL COUNSEL

[The following statements explaining certain operations of the Office of General Counsel of The National Labor Relations Board were submitted by NLRB General Counsel on June 29, 1961 to a House Labor Subcommittee on the NLRB.]

ADVISING NLRB REGIONAL OFFICES

A major segment of the General Counsel's policy-making functions is placed in the Regional Office Advice Branch which constitutes a subdivision of the Division of Operations. The Advice Branch is headed by an Assistant General Counsel, who, with the assistance of an Associate Branch Chief, supervises and coordinates the work of 24 attorneys.

Essentially, the function of the Advice Branch is what its name implies It formulates for the approval of the General Counsel, uniform policies in novel, unsettled or ambiguous areas of the law and furnishes advice to the various Regional Offices regarding the appropriate course of action in specific cases.

The Branch processes approximately 130 cases per month which reach the Washington office through two main channels. First, Regional Directors, at their own discretion, may submit those cases for advice which, in the opinion of the Regional Director, present either novel or complex issues which the Regional Director wishes to have resolved by the Washington office. Similarly, where Regional Directors are confronted with either complicating Board or Court precedent, or believe that the specific area of the law is ambiguous, they may, at their discretion seek advice from Washington.

The second major channel of communication in this area involves those categories of cases which Regional Directors are

required to submit for advice because they concern issues wherein a uniform policy determination is essential to the sound and fair administration of the Act. Essentially, those cases fall in the following categories:

1. Cases involving the interpretation of the recently enacted amendments to the National Labor Relations Act, such as Section 8(b)(7) of the Act which concerns recognition and organizational picketing; Section 8(e) of the Act, which outlaws hot cargo contracts; and Section 8(f) of the Act which exempts the building and construction industry from certain provisions of the Act.

2. Cases which involve the interpretation of major Board or Court pronouncements which require analytical study and subsequent uniform application. Examples of such situations are cases involving hiring halls in the maritime industry; the validity of certain union security provisions such as agency shop clauses in so-called right-to-work States; and certain remedial problems such as the disgorgement of illegally withheld union dues.

3. Certain building and construction industry cases. The submission of these cases for advice is required because the building and construction industry, by it very nature, has certain unique problems which have traditionally required the closest attention by the Washington office. To mention but one of these it is, of course, generally known that due to the temporary nature of building projects and the fluid labor force engaged in construction work, the Board has encountered considerable difficulties in holding representation elections among building and construction employees. From this, of course, flows a number of problems which make the uniform application of the Act in this particular industry extremely difficult.

From time to time, as definitive policy determinations are reached in Washington, many of these areas are redelegated to the Regional Directors and the submission of such cases for advice again reverts to the discretion of the Regional Director.

Regarding the mandatory submission of cases, those points should be emphasized. In the first place, the fact that certain

cases, and these do not constitute more than approximately 5% of the total case load, must be submitted to the Advice Branch, must not in any way be construed as a lack of confidence in the Regional Director or the Regional Officer staff. On the contrary, it is our opinion that the Regional Directors and their staffs are highly competent and are an integral and essential part of the General Counsel's policy-making function. Thus, cases submitted for advice are invariably accompanied by recommendations formulated by the Regional Directors and their staffs, thereby enabling the Washington office to fully utilize the experience and thinking of the entire Regional staff. However, it can readily be seen that if 28 regional directors were to interpret novel legal issues and apply these interpretations within the confines of their Regions without any coordination by the Washington office, the end result would indeed be chaotic. Thus, the law would be interpreted and applied in one way in New York and in an entirely different way in Chicago, or San Francisco, or Atlanta. It must be stressed, therefore, that the advice function supplied by the Washington office is essential to a fair and uniform administration of the Act.

Secondly, the Advice Branch does not ordinarily review the Regional Director's factual determinations and conclusions and it does not interfere with the investigatory duties of the Regional Office, but rather, concerns itself with the interpretation and application of legal principles.

So much for the functions of this particular Branch. The actual operations of the Branch are as follows:

Cases submitted by Regional Directors are assigned by the Branch Chief or Assistant Branch Chief to individual staff attorneys. The attorney, studies the Regional Office submission memorandum which sets forth the facts of the case, the issues on which advice is sought, and the Regional Office's recommended action. The Advice attorney, in most cases, also reviews the case file in order to clarify any ambiguities or to ascertain whether there are

other legal or factual issues which should be considered. The reviewing attorney researches all cases in point and ascertains the applicability of prior advice determinations in similar or related cases. Having been reviewed the case is then submitted for further consideration to an Agenda. This Agenda, depending on the complexity of the case, is attended by various members of the General Counsel's staff. Ordinarily the participants at the Agenda meetings are: the Assistant General Counsel in charge of Advice, the Associate Branch Chief, the Assistant General Counsel in charge of District Court Litigation, the Special Assistant to the General Counsel, the attorney and supervisor who reviewed the specific case, and in many instances, the Associate General Counsel in charge of the Division of Litigation. Again, depending on the complexity of the case, cases may be submitted to the Agenda orally or by written memorandum. However, all submissions to the Agenda include the Regional Office's recommendations, together with any concurrence or disagreement by the Advice Branch. The Agenda decision is submitted to the General Counsel by the Branch Chief or Associate Branch Chief, together with any dissenting opinions. In special cases involving extremely complex issues, the General Counsel may schedule special Agendas and invite other staff members to submit their recommendations.

The General Counsel's final determination is communicated to the Regional Office by way of a memorandum from the Advice Branch. In order to avoid any misunderstanding between the Regional Office and the Advice Branch, this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and a detailed legal rationale, including any pertinent Board or Court decisions.

Because of the complexity or novelty of the cases submitted for advice, parties occasionally, and in approximately 1% of the cases, seek personal conferences with the General Counsel or the Assistant General Counsel. Since it is of the utmost importance

to understand fully the issues, as well as the positions of the parties in these cases, such meetings are ordinarily arranged. However, in order to avoid any semblance of ex parte proceedings, all other parties in the case are invariably and immediately notified of such meetings and are given an equal opportunity to meet with the General Counsel or the Assistant General Counsel and fully state their position.

It must be emphasized, of course, that the number of cases submitted for advice represents but a fraction of the overall case load handled by the Regional Offices. Thus, during the past two years an average of 10% of the total case loads has been submitted for advice. In this respect, it is also noteworthy that although the Advice Branch concerns itself with the most complex and novel legal issues and does not review de novo the factual conclusions of the Regional Offices, the litigation success during fiscal year 1960 was 82%. It must also be noted, however, that during the first half of fiscal 1961, this litigation success was reduced to 63% of the cases so far decided by Board decision or Intermediate Report. The difference may well be explained by the fact that a large number of cases involving the Landrum-Griffin Amendments to the Act have not as yet reached Board or Court determinations, but have been decided in a variety of ways by individual Trial Examiners.

It should be noted that the Advice Branch, like other operations of the General Counsel, is concerned with a speedy resolution of the issues presented to it. However, while time targets have been set for handling of advice cases, it is fully recognized, as in the time targets in the Regional Offices, that disposition of a case within the allotted time—10 days—is an aim and not a strait-jacket. Flexibility with respect to the time for handling of cases is an absolute necessity and is recorded in the day-to-day execution of the advice function. Thus, cases of great complexity and difficulty may often exceed the 10-day period, while other cases with relatively simple fact and legal issues are handled in less than 20 days. Also, cases which have

statutory priority, and especially 8(b)(7) cases wherein the Statute specifically stresses the expeditious resolutions of the case, are handled in a much shorter period than 10 days.

It should also be noted that these time targets cannot and do not apply to cases which may be deferred pending decision in related cases by the Board, Supreme Court or Circuit Courts of Appeals. For example, "flag of convenience" cases which were required to be submitted for advice, had been deferred pending the Board's decision in the *West India Fruit* case [1961 CCH NLRB Decisions ¶ 9654]. Similarly, cases involving agency shop issues in right-to-work States, have been deferred pending the Board's decision in *General Motors* [1961 CCH NLRB Decisions ¶ 9663], a decision which is presently pending consideration by the Board. Also, as an example, cases involving the *News Syndicate* issue, recently decided by the Supreme Court [42 LC ¶ 16,889], were deferred pending the Supreme Court's disposition of this issue.

In addition to the above, cases involving identical or similar issues may be decided together so that, on occasion, a specific case may be delayed until another related case is ready for disposition. Such deferral of a case is, of course done in the interest of uniformity in approach.

Despite the great flexibility in the time targets and the overriding consideration that on no occasion will quality of the decision be subordinated to a time target, the Advice Branch is able to show impressive gains in the speedy resolution of cases. Thus, in December 1958, the mean average for handling of an advice case was 29.3 calendar days. By December 1959, six months after General Counsel Stuart Rothman assumed office, this figure was reduced to 14.9. By June 1960, the mean average days for the processing of an advice case was 11.8 calendar days. By December 1960, this was reduced to 11.1, and by March 1961, the mean average was 10.9 calendar days.

NATURE OF THE "ADVICE" FUNCTION

Since 1947, when the Office of the General Counsel of the National Labor Relations Board was created, some kind of advice function has been performed at the Washington level with respect, *inter alia,* to significant, novel or complex cases and cases where uniformity in approach was of particular importance.

Absent some kind of centralized advice section into which important novel and complex level issues can be channeled, the risk of chaotic development in the law would be marked. For, were Regional Directors left entirely free in this regard, each might proceed on his own view of a given legal question with the result that the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others. Such a result would be at odds with the statutory purpose of encouraging stability in labor management relations. And the omission of selective control by the General Counsel, over these important cases would amount to a failure to exercise his statutory role in administering the law.

The advice function is recognized as particularly significant in view of the broad regulatory scope of the Labor Management Relations Act, which encompasses dynamic, interrelated, interacting and sometimes conflicting rights and privileges. Restrictions in one statutory section have often to be considered together with privileges recognized in another. To make the statute's regulatory intent and design meaningful in a complete sense, a uniform approach which keeps in mind all pertinent interests under the statute is necessary.

Also, with respect to the General Counsel's role in interpreting the statute and developing the law thereunder, it should be appreciated that when he authorizes formal proceedings in a case, he becomes an advocate for the theory underlying the complaint which he issues. While the General Counsel may,

on occasion, present a theory to the Board for decision with respect to which the General Counsel is not in entire agreement, this does not mean that any and every question of law must be or should be put to the Board. Nor does it mean that any legal question should be put to the Board, immediately such issue arises. It must be kept in mind that when litigation is begun on a given theory of law, there may be highly unsettling effects in labor management relations while the issue is wending its way through Board litigation and adjudication, Circuit Court adjudication and possible Supreme Court decision. While this is ordinarily a concomitant of any important litigation which has broad impact, such an effect must give one pause in beginning the litigation unless it is believed that there are very strong reasons under the statute to do so. This concern may also be important in deciding when, if at all, litigation of a particular legal issue should appropriately be instituted.

Finally, it should be noted that while the Regional Offices are performing their functions at an extremely high level of competence and dispatch, no one Regional Office deals with more than a fraction of the complex and novel legal questions which are channeled into the Advice Branch. Thus, the experience of having researched, analyzed and hauled generally similar problems of law permits the Advice Branch to supply reasoned, correct and uniform answers to questions which a Regional Director, acting alone, would find extremely troublesome.

What, then, are some of the sources, criteria and factors considered in deciding cases submitted for advice? Many factors may be considered, dependent on the issue posed, and the advice decision may, on occasion, represent a balancing of such factors. In some cases, the course to be taken is clear while in others, it may not be. But in all cases a carefully reasoned basis exists for the conclusion and recommendation reached. Among the sources and factors which may be considered in reaching a conclusion in a given case are:

1. Supreme Court decisions;

2. Controlling Board law;

3. Court law where the Board position is not to the contrary;

4. Clear statutory language;

5. Legislative history;

6. The general policy of the Act;

7. The ascertainable purposes of the particular statutory sections involved in the case;

8. The impact of the alternative courses on settled law;

9. The individual case as an appropriate vehicle for testing a given issue;

10. The time and circumstances under which the issue arises in relation to the developing Board law; (This may include seeking reexamination of prior Board decisions.)

Examples of the utilization of each or combinations of these criteria could be readily given. In the interest of bervity, however, only one problem, but a highly important one, is discussed as an example. The question for advice was the disposition of concurrent charges of 8(a)(5) and 8(b)(7)(C) violation.

In considering the problem of the concurrent 8(b)(7)—8(a)(5) case, the primary alternatives were, on the one hand, to take the position that despite the existence of a meritorious 8(a)(5) case, the union's picketing to protest this illegal refusal to recognize and bargain nevertheless violated Section 8(b)(7). On the other hand was the alternative of deciding administratively that a Section 8(a)(7) charge lacked merit if the employer who was being picketed was illegally refusing to bargain with the union.

The procedure, recommended to and adopted by the General Counsel, was to defer proceedings on an 8(b)(7) charge where the employer involved, was concurrently and illegally refusing to bargain, as determined by an investigation of an 8(a)(5)

charge. This was considered to be warranted in view of the highly unsettling effect the alternative procedure would have, particularly with respect to the rights of employees and unions recognized under Wagner and Taft-Hartley. The alternative procedure, as noted, was to process concurrently the 8(b)(7) charge and the 8(a)(5) charge, thus requiring an injunction of the union's picketing while simultaneously taking the position in the 8(a)(5) case that the employer was *illegally withholding recognition* from the union. For reasons noted, the General Counsel was reluctant to adopt this position until some guidance could be obtained from Board's decisions in the 8(b)(7) area.

The General Counsel's approach, which was upheld in the court litigation of *Scott* v. *Rothmen* [41 LC ¶ 16,535], has, in effect, sought to maintain privileges of employees and labor organizations until such time as the Board would indicate that such privileges were negated by the enactment of Section 8(b)(7).

It should be noted further that the 8(b)(7)—8(a)(5) cases, considered as an integrated fact situation, have not been deferred or suspended. Rather, the basic dispute, i.e., the employer's refusal to recognize the union, has been litigated before the Board. What has not yet been litigated in these situations is the question of whether a union is privileged to picket in protest of the employer's illegal refusal to bargain.

In some of the recent decisions of the Board, there is language in the majority opinions which suggests that an 8(b)(7) and 8(a)(5) violation can exist concurrently. *Charlton Press*, 130 NLRB No. 90 [1961 CCH NLRB Decisions ¶ 9717]. However, the issue is still not free from doubt, particularly since a motion for reconsideration has been filed in that case.

When the Board has finally spoken in the *Charlton Press* case, the procedure the General Counsel should adopt may well become clear. However, in view of its highly unsettling effect on labor relations generally, and its impact on settled law prior to

enactment of 8(b)(7), proceeding on 8(b)(7) charges in the situations discussed above was not believed warranted absent some indication from the Board that concurrent processing of 8(b)(7) and 8(a)(5) charges was contemplated and required by the new section.

Nature, Function and Administrative Operation of Office of Appeals

Under Section 102.19 of the Board's Rules and Regulations, provision is made for an appeal to the General Counsel from the refusal by a Regional Director to issue complaint. Whenever such refusal occurs, the Director so advises the charging party in writing, briefly stating the reason for his action, informing the party of his right to appeal and the date by which the appeal must be filed, and noting that additional time will be granted on a showing of necessity. Copies of the above letter are sent to all parties concerned. It should be emphasized at this point that the standard operating procedure applicable to all regional offices requires that the charging party be fully apprised of the reasons for the refusal to issue complaint prior to the ending of the letter. This procedure is designed to afford the charging party the opportunity to discuss the issues and offer further evidence prior to formal action, and to enable him to prepare his appeal intelligently in the event the regional office adheres to its position in the matter.

When an appeal is filed it is referred to the Office of Appeals which acknowledges its receipt, sending copies of the acknowledgement to all other parties and attorneys of record. The Regional Director with whom the Rules require a filing of a copy of the appeal, then forwards the entire regional office file to the Office of Appeals together with his comments concerning the position taken by the charging party in his request for review. While the file and comments are usually forwarded within 3 days of the receipt of the copy of the appeal, the Regional

Director may in his discretion defer submission pending further investigation if such action is deemed necessary to resolve issues raised by the charging party in his appeal. Moreover, if, upon further investigation, evidence is disclosed which, in the judgment of the Director, supports an unfair labor practice finding, he has the authority to withdraw his dismissal letter and issue complaint. In this event, all parties concerned are advised by the Office of Appeals that it is closing its file in the matter.

Upon receipt by the Office of Appeals of the regional office file and comments, the entire matter, including any statement which a respondent may care to submit, is assigned to a staff attorney for study. The latter, after examining the file and all relevant documents in detail, prepares a memorandum which contains a statement of the facts, and analysis of the factual and legal issues involved, and a recommendation for disposition of the appeal. The matter is then reviewed by a supervisor. Effective supervision is guaranteed by not assigning more than three attorneys to any supervisor. Any disagreement between the attorney and the supervisor is noted in the memorandum.

In due course the case is scheduled for consideration by the Appeals Committee, consisting of the Director and Associate Director of the Office of Appeals and a third top staff member, with a combined experience with the Agency totalling over 40 years. No staff personnel participating in the determination of an appeal have had any connection with the case at any earlier stage.

The Appeals Committee meets twice each week to consider a case agenda prepared sufficiently in advance to afford Committee members the opportunity to read the memoranda and familiarize themselves with the cases. Each case on the agenda is considered in detail with both the attorney and supervisor freely participating in the discussion and expressing their views. If, in the judgment of the members of the Committee, the file does not contain sufficient information to permit a resolution of the

issues in dispute, the case is remanded to the regional office with instructions to conduct such further investigation as is necessary to obtain the information in question.

If a party or his attorney in a given case desires an opportunity to present his views in person, a meeting is arranged for this purpose with equal opportunity being accorded to the other side. In cases where such meetings take place, a file memorandum is prepared by the responsible attorney setting forth the views expressed by the various parties concerned, and, in situations where it is deemed appropriate, a cpoy of this memorandum is forwarded to the regional office for comment.

On the basis of the original case analysis memorandum, the deliberations of the Appeals Committee, and upon any oral presentation made by the parties, the Committee makes its decision. This decision is reduced to the form of a "General Counsel's Minute" which covers the relevant facts and the reasons for the decision. This minute is cleared, in the usual case, through the Special Assistant to the General Counsel. When a case presents a novel or especially difficult problem, involves a policy issue, or is one in which there is disagreement among top-level staff personnel, the case is discussed in detail with the General Counsel who, in effect, reconvenes the Appeals Committee and participates in its further deliberations.

All parties concerned and their attorneys are advised of the decision by letter. While this ordinarily closes the matter, requests for reconsideration are entertained. In such instances, the evidence in its entirety is carefully reviewed in the light of reasons advanced by the charging party in support of his request and all interested parties are notified of the disposition of the matter.

From what has been said above, it is clear that every effort has been made to provide "administrative due process" in the handling of appeals cases. I want to assure the Committee, however, that this Office is keenly aware of its continuing responsi-

bilities in this area. To this end, a study is currently under way to determine whether any improvements can be made in our case handling processes. In this connection, I have recently taken the opportunity to reemphasize to all Regional Directors and Officers-in-Charge the necessity of making certain not only that a charging party is fully informed concerning the region's position prior to the issuance of the formal dismissal letter, but that if such information is conveyed orally the charging party fully understands the basis for dismissal, and that if the Regional Director has any doubt that such understanding exists, the reasons for dismissal must be expressed in the dismissal letter itself.

Office of NLRB General Counsel

At this point, I would like to address myself to the suggestion, which witnesses have made to the Committee, that all cases involving factual issues should be sent to hearing before a trial examiner rather than dismissed administratively. Since the vast majority of cases do present factual issues of one kind or another, and only some of these involve credibility, as discussed in Appendix C [not published], adoption of the suggestion would have required in fiscal 1959, for example, the issuance of complaint in almost 10,000 additional cases. The serious impact that such a course would have had on the Agency's already heavy backlog, with only 2,100 complaints issued during that year, is obvious. Moreover, I am at a loss to understand the justification for adopting a different standard for the Board's operations from that which is applicable to other governmental agencies, including district attorneys, whose day-to-day operations require the making of credibility resolutions in deciding whether to proceed in a given case. In my view, not only would such a procedure impose an undue and unreasonable burden of litigation on respondents, employers and unions alike, merely because someone, uninhibited even by the deterring costs confronting a private litigant, sees fit to file a charge however lack-

ing in merit, it would also cripple the processes of the Agency by producing untold delay, with its consequent effect on the parties, in a field where the very proponents of this procedure recognize that time is peculiarly of the essence. I cannot believe, for example, that those who espouse the indiscriminate issuance of complaints have given sufficient thought to the effect such course would have in preventing a prompt resolution of questions concerning representation through the filing of blocking charges. More specifically, the indiscriminate issuance of meritless complaints would effectively prevent the holding of representation elections with the necessary consequence of leaving unsettled industrial relations in very broad areas of our economy. In fact, such indiscriminate issuance of complaints could effectively nullify the representation machinery of the Act and negate the legisaltive policy of fostering industrial peace.

The suggestion has also been made that the relatively small number of cases in which the Regional Directors' refusals to issue complaint have been reversed on appeal supports the contention that the Office of Appeals is "rubber-stamping" the Directors' action. The Committee should bear in mind in this connection that the percentage of reversals (on the average about (6%) will necessarily be small since all of the cases on appeal have been subjected to careful evaluation at the Regional Office level by top-echelon field personnel, the great majority of whom have had long years of experience and proven integrity and ability, [which] provides a firm guarantee that the decision in every appeals case is made on the basis of a careful *de novo* evaluation and review of the evidence disclosed by the field investigation. In the final analysis it is the character and caliber of the men who perform the function more than the structure that determine its quality and fairness, which constitute at once the objective and foundation of due process.